Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998
JOSEPH LOCASCIO,

Petitioner,

vs.

ROBERT E. RUBIN, ET AL.
SECRETARY OF THE TREASURY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the 9th Circuit

PETITION FOR WRIT OF CERTIORARI

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7288

QUESTIONS PRESENTED

Whether the District Court has jurisdiction over claims of intentional race, age, ethnicity, religious and marital status discrimination, targeting and retaliation under Federal Civil Rights, Disability and other Statutes?

Whether limited administrative settlement agreements that cover only disability retirement and performance issues and are not global to all employment matters, prevent jurisdiction of separate matters of intentional discrimination, targeting, retaliation and other statutory claims in Federal District Court?

Whether the Civil Service Reform Act of 1978 (CSRA) with the issuance of a "Right to File a Civil Action" letter by EEO, after all administrative actions were exhausted and exposed, including a narrowly-focused MSPB settlement, allows for jurisdiction in Federal District Court?

Whether exhaustion of administrative remedies should be required before seeking judicial intervention when such requirement effectively serves to irreparably harm and confer undue prejudice to Plaintiffs by blocking the adjudication of Constitutional issues of race, age, ethnicity, religious and marital-status discrimination, targeting and retaliation?

Whether disabled Federal employees should be forced to choose between (a) a lengthy and costly litigation process to enforce their rights under the Americans with Disabilities Act and other Federal statutes, or (b) securing immediate, subsistence benefits which risks the implication that there has also been agreement to waive all Constitutional rights, even when this condition is absent from a written administrative settlement agreement?

PARTIES TO THE PROCEEDING BELOW

Pursuant to Rule 14.1(b) of the Rules of the Supreme Court of the United States, the petitioner files this certificate as to parties and others who may have an interest in the outcome of this case:

Petitioner is Joseph LoCascio, Plaintiff in the United States Court of Appeals, 9th Circuit and the Appellant on appeal. Respondents, defendants in the United States Court of Appeals, 9th Circuit and Appellees on appeal, are Robert E. Rubin, et al., Secretary of the Treasury.

United States assistant attorney, Marcus M. Kerner, attorney of record for the Respondents, may also have an interest in this outcome of this case.

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PETITION FOR WRIT OF CERTIORARI

Joseph LoCascio respectfully petitions for certiorari to review the judgment and opinion of the United States Court of Appeals for the 9th Circuit in *Joseph LoCascio v. Robert E. Rubin, et al., Secretary of the Treasury.*

OPINIONS BELOW

On November 5, 1996 the District Court ordered that Respondent's motion to Dismiss with Prejudice is GRANTED without leave to amend.

On March 18, 1998, the United States Court of Appeals for the 9th Circuit AFFIRMED the District Court.

In an Order issued on September 8, 1998, the United States Court of Appeals for the 9th Circuit voted to deny Appellant's Petition for Rehearing.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. { 1254(1). Final judgements or decrees rendered by the (United States Court of Appeals for the 9th Circuit) may be reviewed by the Supreme Court by writ of certiorari where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of the United States.

For Jurisdiction in Court of First Instance, the United States District Court for the Central District of California had jurisdiction pursuant to 28 U.S.C. {1254 (1) to adjudicate all relevant facts and issues of this action.

For cases from Federal Courts: The date on which the United States Court of Appeals decided instant case was March 18, 1998. As the opinion of the United States Court of Appeals on a Petition for rehearing was filed on September 8, 1998, this petition is timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III of the Constitution of the United States provides that District Courts shall have original jurisdiction of all civil actions arising under the Constitution and laws of the United States. Civil actions for monetary damages against Federal officers have subsequently been permitted under Section { 1331 for violations of the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980). In each of these cases, the court found that there were no (special factors counseling hesitation in the absence of affirmative action by Congress), no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy.

STATEMENT OF THE CASE

A. Background Facts

Plaintiff began working for the Internal Revenue Service on July 2, 1979 as a field agent. Plaintiff received excellent evaluations during this time. Within seven years, Plaintiff went from a level GS-5 to a level GS-13.

In December, 1984, Plaintiff applied to the Appeals Department. Plaintiff started working at the Laguna Niguel

IRS Appeals Office on February 1, 1985. In October, 1986, Plaintiff was promoted to GS-13 status. Plaintiff received three outstanding performance awards, a plaque, checks and other recognition for his excellent work. Plaintiff was considered an outstanding career employee whose work performance resulted in him climbing up the promotional ladder quickly.

In September, 1991, after 12 years of outstanding employment with the IRS and despite no change in Plaintiff's work productivity or performance, Plaintiff suddenly received a lower subjective evaluation of his work which coincided with the arrival of a new Chief of Appeals. Following Plaintiff's grievance over lowered scores without prior notice or counseling, management began a pattern of harassment, retaliation, targeting and discrimination over the next three years.

As a result of this on-going conflict, which created a hostile work environment, and being targeted for removal by management, Plaintiff experienced significant anxiety and depression. While off-the job, Plaintiff was hit by an automobile as he was walking across the street in a marked crosswalk. He sustained medically documented head, neck and back injuries which were aggravated at work by being required to sit at his desk for long periods of time with his head, neck and back in a forward and extended position to perform his job duties which included use of a personal computer. He filed for disability on September 22, 1994. On December 24, 1994, while on medical leave, he was terminated.

B. Original Selection of EEO Forum, Exhaustion of Administrative Remedies and EEO Issuance of a "Right to File a Civil Action"

Plaintiff had a "mixed case" (a personnel action and claims of intentional discrimination) that went before the Equal Employment Opportunity (EEO) and Merit System Protection Board (MSPB). The Plaintiff originally selected the EEO forum by filing his original complaint on October 5, 1994. The Plaintiff did not abandon the EEO process and did exhaust all his administrative remedies. The trial judge was incorrect when he stated on page 3 line 17 of the District Court Order that the Plaintiff abandoned the EEO process and did not exhaust all his administrative remedies. In fact, EEO abandoned the Plaintiff when the counselor retired and Plaintiff was then issued a formal right to file a discrimination complaint one year later.

The Plaintiff did go through the informal process as prescribed by the EEO rules. The trial judge was also incorrect when he stated on page 3 line 23 that the Plaintiff did not pursue his complaint further. The Plaintiff was provided with a "Notice of Right to File a Discrimination Complaint" form after the informal process was completed. The Plaintiff elected the EEO forum (October 5, 1994) before the MSPB forum (January 23, 1995). These facts contradict the trial judge's statement on page 3 line 25. Rule { 1614.105(e) of EEO states that the form must be issued by EEO. The EEO office issued the Plaintiff the "Notice of Right to File a Discrimination Complaint" form on December 5, 1995. The Plaintiff filed a formal complaint within 15 days of receipt of the form as prescribed by the rules. All of the issues alleged on the complaint form (intentional age, race, ethnicity, religion and marital status discrimination, targeting and retaliation) were brought to the attention of the counselor, David Lancaster. The Plaintiff followed all the EEO regulations and filed a formal complaint in a timely manner immediately upon receipt of the "Notice of Right to File a Discrimination Complaint" form on December 9, 1995.

The EEO final decision letter of December 27, 1995 dismisses the case only for failure to comply with the prerequisite counseling requirement and for being untimely. The Plaintiff states that he had the required counseling and that he met all the time frames as required by EEO. It was EEO that sent the notice of right to file a civil action on December 5, 1995. The Plaintiff argues that the final decision letter (December 25, 1995) is factually incorrect and that the reasons for dismissing the EEO complaint are unfounded and inappropriate pursuant to 29 CFR { 1614.302. The Plaintiff did not agree with the final decision and was given his "Right to File a Civil Action", which he did within 30 days.

The defense in this case is arguing that the employee must elect one forum to proceed, either EEO or MSPB. EEO acknowledged that Plaintiff first filed with them when they did not cite that as a reason for dismissal of the EEO complaint after the Plaintiff informed them of an MSPB case being filed. This is in the EEO rules (see copy of EEO Rule 5 on Mixed Cases, Part (c), in Appendix). The rule states that if EEO has determined not to consider the decision of the MSPB, the complainant may file a civil action in United States District Court within 30 days.

C. Full Disclosure of MSPB Case (Disability Retirement and Performance Issues Only); EEO Waives Right to Dismiss Based on Existence of MSPB Case

The Plaintiff, on filing his EEO formal complaint on December 9, 1995 disclosed the fact that an MSPB case was filed. The case number and status-dismissed (which it was) were revealed. The fact that EEO in their final decision letter of December 27, 1995 does not mention the MSPB case or

settlement, acknowledges that the agency (EEO) determined not to consider the decision of MSPB as a reason for dismissal on the EEO complaint) waive their right, on that basis, to prevent the civil action from going forward to trial. In fact, after they were informed of an MSPB dismissal of the case, they subsequently issued a Right to File a Civil Action letter.

Thus, by issuing Plaintiff a Right to File a Civil Action, the EEO acknowledged that all the rules were adhered to by the Plaintiff. The EEO rules state (see EEO rules under section, "Right to File a Civil Action in Mixed Cases" Part (c)) that if EEO has determined not to consider the decision of the MSPB – the plaintiff has 30 days from receipt of Notice to File a Civil Action. The Plaintiff followed this rule. On the EEO formal complaint form issued December 9, 1995, the form asked if an MSPB case had been filed, he was subsequently issued a Right to File a Civil Action letter by EEO.

The administrative function of EEO is acknowledging that the MSPB decision is not where jurisdiction ends, when it issued the Plaintiff a Right to File a Civil Action regardless of any prior administrative decisions.

REASONS FOR GRANTING WRIT

The Petitioner, Joseph LoCascio, petitions the Supreme Court of the United States, pursuant to 28 U.S.C. { 1257 (a) to review the final order of the United States Court of Appeals for the 9th Circuit prior to its issuance of mandate herein.

The Petitioner has no other adequate means to obtain the relief he seeks absent an adjudication of the Federal discrimination claims statutes.

I.

THE FEDERAL CIVIL RIGHTS LAWS THAT SINCE 1964 HAVE MADE IT ILLEGAL FOR EMPLOYERS TO INTENTIONALLY DISCRIMINATE BASED ON RACE, SEX, RELIGION, ETHNICITY AS WELL AS AGE AND DISABILITY, WERE RULED BY THE U.S. 9TH CIRCUIT COURT OF APPEALS "TO TRUMP" THE BINDING ADMINISTRATION ARBITRATION CLAUSES.

THUS, *DUFFIELD* WAS ALLOWED TO ADJUDICATE SEPARATE CLAIMS OF DISCRIMINATION AND RETALIATION IN COURT. THE 9TH CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH ITSELF IN ALLOWING *DUFFIELD* AND NOT THE PLAINTIFF TO HAVE JURISDICTION OF SEPARATE MATTERS (FEDERAL CIVIL RIGHTS STATUTES) CLAIMS IN FEDERAL DISTRICT COURT.

As recently as November 16, 1998, the U.S. Supreme Court reversed lower courts (*Robertson, Stephens & Co. v. Duffield*, 98-237 and *Wright v. Universal Maritime Services Corp.*, 97-889) by allowing discrimination cases to be heard in Federal District Courts even when unions have policies requiring resolution of disputes administratively.

In the *Wright* case, as in this instant case, the appeals court barred plaintiffs from suing in Federal Court. All nine U.S. Supreme Court Justices voted to reverse that ruling in the *Wright* case noting, as Justice Antonin Scalia said, "The right

to a federal judicial forum is of sufficient importance that it cannot be casually waived".

II.

THE CENTRAL DISTRICT COURT'S ORDER IN THE INSTANT CASE IS IN CONFLICT WITH RULINGS FROM OTHER DISTRICTS. THE 3RD CIRCUIT VACATED A DISTRICT COURT'S DISMISSAL OF AN IDEA CLAIM AND REMANDED, FINDING THAT EXHAUSTION OF ADMINISTRATIVE REMEDIES CAN BE EXCUSEDWHERE THERE IS AN EMERGENCY OR WHERE THE QUESTION IS PURELY LEGAL, OR WHERE REQUIRING THE PERSON TO EXHAUST HIS ADMINISTRATIVE REMEDIES WOULD RESULT IN IRREPARABLE HARM TO THE PERSON.

The general requirement is that a plaintiff, before seeking judicial intervention, must first exhaust available administrative remedies. Under the Individuals with Disabilities Education Act (IDEA), this is specifically required. 20 U.S.C. { 1415 (e), I.C. 4-21.5-5-4. Failure to exhaust remedies can be excused where the plaintiff can prove that pursuit of such remedies would be futile or inadequate *Norris v. Greenwood Community School Corp.*, 797 F.Supp. 1452, 1567 (S.D. Ind. 1992).

The issue has arisen again in a number of jurisdictions. In *Komninos v. Upper Saddle River Board of Education*, 13 F.3d 775 (3rd Cir. 1994). If the Plaintiff, Komninos, can demonstrate irreparable harm will occur unless exhaustion of administrative remedies is not required, then an emergency exists which excuses such recourse. "Irreparable harm"

means the student "will suffer serious and irreversible mental or physical damage".

The 1996 Senate Bill #720 enacted by the 88th General Assembly of the State of Missouri repealed current law. Under current law in Missouri, a person must exhaust his administrative appeals before he may obtain judicial review of a claim. This new act allows a person to obtain a declaratory judgement from a court without exhausting his administrative remedies. A person may bypass administrative claims and appeals if any of the following are present: (1) the administrative agency has no authority to grant the relief requested; (2) the only question presented is a Constitutional issue or a question of law; (3) requiring the person to exhaust his administrative remedies would result in irreparable harm to the person.

In the instant case, the 9th Federal Circuit does not allow jurisdiction in Federal Court because, in their opinion, administrative remedies have not been exhausted even though the administrative agency has no authority to grant the relief requested and the issues in question are Constitutional questions of law.

It is clear that the requirement of exhaustion of administrative remedies would result in irreparable harm because such requirement would effectively serve to block the adjudication of compelling intentional racial, age, religious, ethnicity, marital status, targeting, retaliation and disability discrimination claims.

III.

THE FACTS IN THE KEY CASE THE APPEALS COURT CITED TO DISMISS, *VINIERATOS V.*

UNITED STATES, 939 F.2D 762, 767 N.2 (9TH CIR. 1991), ARE MATERIALLY DIFFERENT THAN THOSE OF THE PLAINTIFF.

Material points of fact and law have been overlooked in the United States Court of Appeals (9th Cir.) decision. For example, ADEA, unlike Title VII, Section 4.04(b) contains no express administrative exhaustion requirement. The Plaintiff has established jurisdiction of all his ADEA claims in the Appeals Court 28 U.S.C. {1291 (see Appeals Court Memorandum filed on this case March 18, 1998). Since ADEA has no express administrative exhaustion requirement, this court cannot dismiss those claims based on *Vinieratos v United States, 939 F. 2d 762, 767 n.2 (9th Cir.1991).*

The Plaintiff did not appeal his MSPB settlement to District Court because the issues raised in the settlement (disability retirement and performance) do not include the issues of intentional discrimination, targeting and retaliation that were already a part of the original EEO complaint and were still alive through the EEO forum. Nowhere in the MSPB settlement agreement does it state that it is global to all employment matters. The Settlement only settled the issues it addressed. It did not consider the discrimination and retaliation claims covered by Federal statutes that have been filed in Federal Court. The Plaintiff would like to present discrimination and retaliation claims covered by Federal statutes to the District Court and was given this right and venue to do so by the EEO's issuance of a Right to Sue letter.

In the *Vinieratos* case, no formal EEO complaint was ever processed whereas the Plaintiff filed a formal complaint on December 5, 1995 and it was fully processed with a final decision letter, and upon completion, a Right to File a Civil Action was issued. *Vinieratos* filed grievances with his

union. The National Treasury Employees' Union (NTEU) would not file on behalf of Plaintiff saying that he had not been harmed yet. The NTEU took a passive role and did not intervene when management targeted the Plaintiff for removal. Thus, the Plaintiff was denied his right under the Civil Service Reform Act to file a grievance under the NTEU-assisted negotiated grievance procedure.

The Plaintiff's formal and informal complaints were processed by EEOC and never cancelled. The Plaintiff cooperated fully with the EEO process. The Plaintiff completed the administrative process and received a Right to File a Civil Action letter. These are significant distinctions from the *Vinieratos* case. The Plaintiff pursued and processed all administrative remedies with his counselor, David Lancaster, until he was counseled that it was hopeless and futile and then was given his Right to File a Civil Action administratively (*Jordan v. U.S.* 522 F2.d {1128 8th Cir. 1975).

IV.

THIS WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE IT INVOLVES A QUESTION OF MATERIAL IMPORTANCE TO CLARIFY THE CIVIL SERVICE REFORM ACT'S JURISDICTION. THE CSRA CREATES JURISDICTION TO THIS PLAINTIFF WITH ISSUANCE OF A RIGHT TO FILE A CIVIL ACTION. THE CSRA DOES NOT PREVENT JURISDICTION THAT OTHER STATUTES CREATE, FOR EXAMPLE: THE CIVIL RIGHTS ACT OF 1991, AMERICANS WITH DISABILITIES ACT OF 1990, FAMILY MEDICAL LEAVE ACT OF 1993, AND WHISTLEBLOWER PROTECTION ACT OF 1989. THE CONSTITUTION GUARANTEES THAT CLAIMS

ARISING FROM THESE ACTS (STATUTES OF THE UNITED STATES) LIKE DISCRIMINATION, RETALIATION, WHISTLEBLOWING OF FEDERAL OFFICIALS, AND TERMINATION WHILE DISABLED ARE PROVIDED FOR BY ORIGINAL JURISDICTION IN FEDERAL DISTRICT COURT.

The issue in *Vinieratos* is whether the claimant may begin the administrative process, and before it is completed, abandon it for suit in Federal Court. The Plaintiff followed all administrative rules and statutes and strictly adhered to all procedures and time requirements. It is necessary to explain why the existing EEO statute, after it considered the MSPB disability settlement and issued the Plaintiff a Right to File a Civil Action, after all administrative remedies were exhausted, would not allow for other claims to be adjudicated in District Court, when statutes clearly express that original jurisdiction would be in Federal District Court.

Does the Civil Service Reform Act of 1978 (CSRA) with the issuance of a Right to File a Civil Action letter to the Plaintiff by EEO after all administrative actions were exhausted and exposed, including an MSPB settlement, allow for jurisdiction in Federal District Court?

Mr. Kerner, assistant U.S. attorney, stated that the same issues of intentional discrimination and retaliation were litigated by MSPB and settled. The terms of the settlement agreement do not prevent the separate matters of intentional discrimination and retaliation from being litigated in civil court. The Plaintiff's loss from discrimination and retaliation is less severe because of the settlement. This is reflected in an adjustment to damages sought. In fact, the settlement agreement never addressed these issues and they were never litigated at the administrative level. The defense attorney

states the Plaintiff is precluded from re-litigating these issues. The Plaintiff was never given an opportunity to litigate these issues. The terms of the agreement are broad and do not cover all possible claims. Nowhere in the agreement does it state that it is global to all employment matters.

On page 3 line 11 of the Order Entered, the trial judge notes the Plaintiff received a Right to File Notice but dismisses because he believed the Plaintiff abandoned his administrative remedies when the Plaintiff did not seek judicial review of his MSPB settlement. The Plaintiff did not abandon his claims of intentional discrimination and retaliation. These claims were never addressed by the settlement and are still alive through EEO. EEO acknowledged this when they chose not to consider the MSPB settlement and issued a right to sue letter to Plaintiff.

Title 5, U.S.C. { 7703 (a) (b) provides for judicial review. The CSRA as actually written, { 7703 merely creates jurisdiction. Nothing in its language or construction even hints at the withdrawal of jurisdiction elsewhere. The Plaintiff contends the CSRA creates jurisdiction with administrative issuance of a Right to File a Civil Action. The Civil Rights Act of 1991 granting jurisdiction of *United States v. Fausto* 484 U.S. CT. P460 Footnote 5 S. Ct. 668.677.98 L.Ed. 2nd 830 (1988).

Absent an express statement to the contrary, the CSRA cannot be interpreted to deprive Plaintiff of the statutory remedy he possesses under the Civil Rights Act. See *Wood v. U.S.* 16 Pet 342, 362-363 (1842).

The CSRA established a comprehensive system for reviewing personnel actions taken against Federal employees.

The Plaintiff followed all CSRA rules and was issued a right to file administratively. The CSRA { 7703 created jurisdiction in Federal District Court when Plaintiff was issued a right to file.

Given the comprehensive nature of the CSRA, it is highly improbable that Congress intended to make any significant changes in the law that are not plainly discernible from the language of the statute. The realistic appraisal of the actual intent of the lawmakers who drafted and enacted the CSRA is given added support by the strong presumption favoring judicial review of administrative actions. See *Bowen v. Michigan Academy of Family Physicians* 476 U.S. 667, 670-673 (1986).

In the *Fausto* case, the court stated that, "we must presume that Congress drafted the CSRA in the context of our assurances that the act's language would not lightly be found to repeal existing statutes." For example, the Civil Rights Act of 1991. The CSRA does not prevent the Plaintiff from proceeding with an intentional discrimination and retaliation claim under the Civil Rights Act. Congress did not intend to deny judicial review *Abbott Laboratories v. Gardner* 387 U.S. 136, 141 (1967). Congressional intent must be fairly discernible in the statutory scheme *Block v. Community Nutrition Institute* 467 U.S. 340, 351 (1984).

In the CSRA, Congress did not express explicitly the issue of administrative jurisdiction, "Even when substantial doubt about the Congressional intent exists, the general presumption favoring judicial review of administrative action is controlling." Ibid. There simply does not exist in the legislative history or text of the CSRA clear and convincing evidence that Congress intended, despite its silence, to effect a repeal of the Civil Rights Act's jurisdiction.

Congress provided for review of some adverse personnel actions through the MSPB. To infer by Congressional silence that Congress' desire to preclude judicial review of separate matters prevents the Appellant from being made whole again and denies justice.

The Constitution provides that Federal Courts be given original jurisdiction over "all cases, in law and equity arising under laws of the United States". U.S. Const., Art. III {{ 1,2. The Judiciary Act of March 3, 1875 { 1 18 Stat. 470 provides that "district courts shall have original jurisdiction of all civil actions arising under the Constitution and laws of the United States 28 U.S.C. { 1331.

Civil actions for monetary damages against Federal officers have subsequently been permitted under { 1331 for violations of the Due Process Clause of the Fifth Amendment, *Davis v. Passman*, 442 U.S. 228 (1979), and the Cruel and Unusual Punishment Clause of the Eighth Amendment, *Carlson v. Green*, 446 U.S. 14 (1980).

In each of these cases, the Court found that there were no (special factors counseling hesitation in the absence of affirmative action by Congress,) no explicit statutory prohibition against the relief sought, and no exclusive statutory alternative remedy. See 442 U.S. at 246-247; 446 U.S. at 18-20. This is true in the Plaintiff's case. With no Congressional intent in the language of the Civil Service Reform Act of 1978 to prohibit the Plaintiff from bringing an action with other statutes, the Court has allowed for jurisdiction in Federal District Court.

In *Bivens v. Six Unknown Federal Agents*, 403 U.S. 388, (1971) the Court notes that with no explicit Congressional declaration, the majority relied on the rule that "where legal

rights have been invaded, and a Federal statute provides for a general right to sue for such invasion, Federal Courts may use any available remedy to make good the wrong done". Ibid., at 396-397 quoting *Bell v. Hood* 327 U.S. 678, 684 (1946).

The Plaintiff was terminated (12/24/94) after he had put in a claim for disability (9/22/94) and was out on disability sick leave. This is in violation of the Americans with Disabilities Act (1990) (ADA), and section 501 of the Rehabilitation Act. The Agency failed to reasonably accommodate the Plaintiff's condition, subsequently terminating him. This fact and statute were addressed in the Plaintiff's complaint.

The Constitution of the U.S. creates original jurisdiction in Federal District Courts, the Judiciary Act of 1875 provides for original jurisdiction of all U.S. statutes in Federal District Court. The CSRA creates jurisdiction to this Plaintiff with issuance of a Right To File a Civil Action. The CSRA does not prevent jurisdiction that other statutes create, for example: the Civil Rights Act of 1991, Americans with Disabilities Act of 1990, Family Medical Leave Act of 1993, and Whistleblower Protection Act of 1989. The Constitution guarantees that claims arising from these acts (Statutes of the United States) like discrimination, retaliation, whistleblowing of Federal officials, and termination while disabled are provided for by original jurisdiction in Federal District Court.

The Agency was required under the Family Medical Leave Act of 1993 (FMLA) Title II to accommodate the Plaintiff's' disability and grant intermittent leave. The Agency failed to advise Plaintiff of his rights under FMLA and did not provide him with an application claim form. These statutes provide for original jurisdiction and require filings of civil actions in Federal District Court.

V.

APPLICATION OF THE EXHAUSTION DOCTRINE. ALL ADMINISTRATIVE REMEDIES WERE CONFIRMED TO BE EXHAUSTED BY EEOC WHEN THEY ISSUED A RIGHT TO FILE A CIVIL RULES ENFORCEMENT OF FINAL DECISIONS 29 C.F.R. PART 1614.310 – RIGHT TO FILE A CIVIL ACTION WITHIN 30 DAYS OF A FINAL DECISION ACTION TO PLAINTIFF. (SEE EEOC COMMISSION FROM EEOC WHEN EEOC HAS DETERMINED NOT TO CONSIDER THE DECISION OF THE MSPB).

In *Leorna v. Department of State*, the 9th Circuit ruled that if exhaustion of administrative remedies would have been futile, then the Doctrine of Exhaustion would not apply, and the Plaintiff would have a right to jurisdiction in Federal District Court. The Plaintiff in the instant case has established that exhaustion of administrative remedies would have been futile. The EEOC counselor advised him of this fact. The filing of both the informal and formal complaints were timely. The complaint was accepted, processed, dismissed and a final decision letter with a right to file a civil action was issued and granted by EEOC to Plaintiff.

The Plaintiff factually maintains that all administrative remedies have been exhausted. This fact is disputed with the District and Appeals Courts. Exhaustion, even if required, has been obtained by Plaintiff. Plaintiff filed a claim, formal complaint with EEOC in accordance with published procedures (see *Brown v. General Services Admin.*, 425 U.S. 820, 832 (1976). The Plaintiff consulted the EEOC counselor to try to informally resolve the matter. The Plaintiff initiated contact with the counselor within 45 days of the discriminatory act (10/5/94 – 12/24/94), and filed the

formal complaint at the conclusion of the counseling process within 15 days from its issuance. EEOC dismissed the complaint. The Plaintiff disputed EEOC's findings. He contends all EEOC proceedings were exhausted and timely adhered to as set forth by 29 C.F.R. Part 1614.105-107. This is a disputed fact. The Agency issued the Plaintiff a right to file a civil action letter upon the completion and exhaustion of all administrative remedies. Upon this action, the Agency (EEOC) has granted jurisdiction of this case to Federal District Court.

SUMMARY

Plaintiff did cooperate with EEOC and all administrative procedures were adhered to in a timely manner. The Appellant was advised that his administrative remedies would be futile by the EEOC counselor and was given his right to file a civil action. Exhaustion of administrative remedies is not required where exhaustion would have been futile. (See *United Farm Workers of America, AFL-CIO, et al. v. Arizona Agricultural Employment Relations Board, et al.* 669 F 2d at 1253). The Plaintiff did not abandon the EEOC process. This is a disputed fact from the Court. The Plaintiff was counseled, filed informal and formal complaints timely, and was advised his administrative remedies would be futile by the EEOC counselor and issued a Right to File a Civil Action upon completion of the EEOC process and exhaustion of administrative remedies. EEOC did not dismiss the formal complaint because the Plaintiff abandoned the process.

This is an undisputed fact. The Court misstated a material difference of fact. The District Court in its decision states Plaintiff abandoned the process. This is factually incorrect. There is no evidence of the Plaintiff abandoning the process.

There was a delay because the counselor did not issue the formal complaint letter immediately to the Plaintiff upon completion of the counseling period and determination that continuation of the process would be futile. The Administration caused the delay, the Plaintiff cooperated and made all filing deadlines. The process was never abandoned. EEOC notified Plaintiff of their acceptance of his formal complaint on 12/5/95.

The primary purpose of the Doctrine of Exhaustion of administrative remedies is to avoid the premature interruption of the administrative process. When the EEOC notified the Plaintiff of his Right to File a Civil Action in their final decision letter of 12/27/95, they confirmed to Plaintiff completion of administrative efforts on his behalf. (See Administrative Procedure Act 5 U.S.C. 701). The Plaintiff did not interrupt the administrative process prematurely; rather, he was advised it was futile and this completed the process. He complied with all administrative rules and was issued by EEOC a Right to File a Civil Action Sec 1614.310. Several issues of material fact remain unresolved and the District Court improperly dismissed the Plaintiff's complaint for lack of jurisdiction because he failed to exhaust all administrative remedies. (See *Briones v. Runyon, Jr.*, U.S. Court of Appeals, 2nd Circuit (1996). For the fact that EEOC determined that Plaintiff was entitled to pursue his discrimination and retaliation claims by accepting the formal complaint and then issuing a Right to File a Civil Action, jurisdiction is granted in Federal District Court. (See *Gerard v. Ruben* 62 F3d 1245 9th Circuit 1995).

The Plaintiff originally selected the EEOC forum by filing his original complaint on October 5, 1995. The Plaintiff had counseling with his EEOC counselor, David Lancaster, for three weeks and was given his rights and was fully advised

about the complaint process. An inquiry was conducted and information was given. Settlement efforts and jurisdictional questions were discussed. The Plaintiff was advised of his right to file a formal complaint by the counselor. The EEOC counselor advised that a resolution at the informal level would be hopeless and futile. The EEOC counselor advised the Plaintiff that all administrative remedies were exhausted. He fully informed the Plaintiff of the EEOC process and completed his counseling. Upon completion of counseling and exhausting all administrative remedies because of counselor's determination that these would be hopeless and futile, the Plaintiff was issued a Right to File a Civil Action letter by EEOC administratively. With knowledge of and consideration of the settlement by MSPB, this under the EEOC rules and statute, legally allows Plaintiff to file a civil action for other unsettled claims in District Court. (See EEOC rules on Right to File a Civil Action in Mixed Cases).

The *Vinieratos* case states the claimant was trying to get the "best deal" administratively from EEOC, MSPB, etc. The Plaintiff states that he only wants the right to adjudicate claims that have not been administratively settled. The Constitution and, subsequently through statute, entitles the Plaintiff to original jurisdiction of these claims in Federal District Court.

In the original defense Motion to Dismiss, Mr. Kerner states that the Plaintiff attempted to resurrect his settled claim by filing an EEO claim. If we examine the settlement agreement in more detail, it settles all claims of disability and performance only. All other claims of the Plaintiff are, in fact, not settled which is in direct contradiction to the opinion of the defense attorney. Additionally, the settlement agreement does not contain a clause or other language in which the Plaintiff releases all other employment claims.

The Plaintiff is not resurrecting his settled claims; he is asking for the right to settle his claims that have not yet been litigated or settle, i.e. intentional discrimination, retaliation and other statutory claims.

Also in the Motion to Dismiss, Mr. Kerner falsely states that the EEO complaint and the MSPB appeal are, "identical". They are not only unidentical, the EEO complaint form specifically asked whether an MSPB claim had been filed on the same matter. Mr. Kerner also falsely states that the Plaintiff's EEO complaint was dismissed because he elected to pursue his remedies before the MSPB. The EEO final decision letter dismisses the case only for failure to comply with the prerequisite counseling and for being untimely. In point of fact, the Plaintiff did complete the required counseling and met all the time frames as required by EEO. It was EEO that sent the Notice of Right to File on December 5, 1995. The Plaintiff argues that the final decision letter of December 27, 1995 is factually incorrect and the reasons for dismissing the EEO complaint are, therefore, unfounded and inappropriate pursuant to 29 CFR { 1614.302(c). The Plaintiff did not agree with the final decision and was given his, "Right to File a Civil Action" which he did within 30 days.

Of particular note is the statement of Mr. Kerner recorded in the Transcript of Hearing held November 4, 1995, in which he states that the, "Plaintiff got the benefit of his bargain" and that "settlement is sacred". In fact, the Agency (U.S. Treasury Department/Internal Revenue Service) which includes the Director of Practice, violated the terms of the settlement agreement. In Item #5, the agreement states:

> "Agency will not oppose the granting of an enrolled agent's card to Appellant, should

> Appellant apply for same, on the basis of any alleged performance or medical problem(s). However, the Agency will answer truthfully all inquiries of the Director of Practice".

Mr. Brauer, the Director of the Office of Practice, notified the Plaintiff by letter on April 25, 1997 of his intent to deny issuance of the enrolled agent's card inferring that the Office of Practice was a separate and distinct entity, and thus not required to abide by the terms of the settlement agreement because it was executed at the District level.

In fact, the settlement agreement was not executed by the District Office, but by the U.S. Treasury Department/ Internal Revenue Service's General Counsel. The District Office, by supplying the supposedly expunged personnel records to the Director of Practice, is acknowledging that they are part of the same Agency.

The Agency has since denied the Appellant his enrolled agent's card and has not expunged the alleged performance portion of the Plaintiff's personnel records, thus the Agency has breached the settlement agreement. The settlement is no longer sacred and binding, as the Defense argued.

This is an example of one federal office refusing to honor an agreement that another federal office has executed when the offices are in integrated part of the same Agency (U.S. Department of Treasury/Internal Revenue Service/Office of Practice) which are all required and collectively function to carry out the overall mission, goals and objectives of the Agency.

The settlement agreement, therefore, has not been honored nor held sacred by the Agency. These actions constitute bad

faith, a breach of contract, and now lay null and void the defense attorney's argument that all employment matters were settled with the MSPB agreement. The Respondent continues to harm the Plaintiff by taking away, after-the-fact, core "benefits" of the negotiated bargain. Thus, the Agency has breached the settlement contract by resurrecting the settled issues of the enrolled agent's card and expunging of personnel records. The Plaintiff, by receiving a disability consideration, received nothing more than what he was entitled to from the monies that he himself had accrued towards his retirement. This evidence directly contradicts the defense attorney's claim that the settlement agreement has resolved all employment matters.

In the Respondent's Brief, Mr. Kerner states that the Plaintiff misinterprets the effect of the dismissal letter that he received from EEO. The Plaintiff states that the EEO dismissal letter never mentions that the EEO claims were dismissed because the plaintiff was pursuing these claims through the MSPB. The dismissal letter never mentions the MSPB at all. Mr. Kerner is mistaken when he continues to insist that this is true. The EEO dismisses the case only for failure to comply with the prerequisite counseling and for being untimely. How can we assume that EEO dismissed because of the MSPB when this is not mentioned or proven anywhere? In point of fact, the Plaintiff did complete the required counseling and met all the time frames as required by EEO.

If the administration (EEOC) did not consider the Plaintiff to have completed counseling, they would not have issued Plaintiff a Right to File a Civil Action letter. By virtue of the EEOC administration taking this action (notifying Plaintiff of his Right to File a Civil Action in District court upon full completion of their process), they have confirmed all

administrative rules were adhered to and thus transferred jurisdiction from the administration (EEOC) for adjudication of these claims to Federal District Court as is stated in the EEOC rules and statute.

The Appellant would like to prove in Federal District Court that the Agency's dismissal was improper. The Agency's actions were taken to target the Appellant for removal based on retaliation, intentional discrimination and all statutory claims as described in the Plaintiff's Complaint for Damages and Opening Brief filed in the Federal Courts.

CONCLUSION

Based on the facts and points of law cited above, the Plaintiff respectfully petitions the United States Supreme Court to reverse the 9th Circuit Court of Appeals and grant this petition for a writ of certiorari.

Dated: February 4, 1999

Respectfully submitted,

Joseph LoCascio, Pro Se
Plaintiff-Petitioner
11 Dry Creek Lane
Laguna Hills, California 92653
Telephone: (949) 458-7784

The 9th Circuit U.S. Court of Appeals is over-loaded with casework; they did not give the Plaintiff's case the legal consideration that it requires. If this Court elects not to consider the issues presented in this writ, it is requested that the writ issues and that the matter be remanded to the 9th Circuit Court of Appeals for a Redetermination in light of the recent Supreme Court rulings allowing jurisdiction of intentional discrimination cases in Federal District Court regardless of administration policies.

APPENDIX

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APPENDIX A – TRANSCRIPT OF HEARING
FILED FEBRUARY 24, 1997

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed February 24, 1997

No. 97-55156

JOSEPH LOCASCIO,

PLAINTIFF/APPELLANT

v.

ROBERT E. RUBIN, ET AL.,

DEFENDANT/APPELLEE

Reporter's Transcript of Proceedings
November, 4, 1996

Gregory L. Bartone, for Plaintiff/Appellant.

Nora M. Manella by *Marcus M. Kerner*, was on the motion to dismiss for Defendant/Appellee.

Before: GARY L. TAYLOR, Judge Presiding

SANTA ANA, CALIFORNIA, Monday, November 4, 1996
A.M. SESSION

Appendix A

THE CLERK: Item 16, SACV 96-86, Joseph LoCascio versus Robert E. Rubin, et al., on plaintiff's motion to continue and go forward and defendant's motion to dismiss.

Would the parties state the appearances, please?

MR. BARTONE: Yes. Good morning, your Honor. Gregory Lee Bartone appearing for the plaintiff in this action. I filed a substitution of attorney this morning.

THE COURT: All right.

MR. KERNER: Good morning, your Honor. Marcus Kerner on behalf of the Secretary of the Treasury of the United States.

THE COURT: Okay. I'll receive and file the original of the substitutions of attorneys. Mr. Bolton, let me sign this.

MR. BARTONE: Thank you, your Honor.

THE COURT: Counsel, since you're newly entered into the case also, there was a minute order issued the other day involving one of the other parties. The clerk is going to make a copy of that so your file is up to date on that.

MR. BARTONE: Thank you.

THE COURT: The Court's tentative ruling was to grant the motion to dismiss in this case without leave to amend. Let me indicate that the nature of the case is we have an Internal Revenue Service agent who has filed the suit claiming that he has been retaliated against in his

employment because of filing a grievance within his employment. It's interesting how a large number of our cases on the calendar this morning involve employment discrimination issues. Well, he actually contends that there was a lot more water that went under the bridge besides that, a lot more dealing among the parties, some time eventually went by, but he contends that eventually he was terminated in December, 1994.

The other side has attacked that based on the motion papers, and the Court has ruled that, in this case, it appears to me that the motion should be granted without leave to amend in this particular case.

Counsel, if you want to speak to the tentative ruling, you are certainly entitled to.

MR. BARTONE: Thank you, your Honor.

THE COURT: All right.

MR. BARTONE: In addressing the tentative ruling, it would appear that the Court correctly identifies this case as a mixed case; therefore, the MSPB or the EEOC needs to get involved.

THE COURT: I believe so.

MR. BARTONE: Now the Court record and, I believe, the declarations that have been filed in this case indicate that my client files the – started the informal process in 1994, specifically October 19194, with the EEOC. There is nothing

within the EEOC guidelines that say how long the informal process should take. Sometimes it could take 30 days. Sometimes it could take a year. Sometimes it could take longer than a year.

In this particular case, it did take longer than a year. The rejection letter from the EEOC received by my client in late '95 indicates that he did not go through the informal process in that he only spoke to the counselor once, he did not get back to the counselor, he did not work with the counselor to try and informally resolve this case.

But my client, in pages 5 and 6 of his opposition papers, stated exactly what he did with the counselor, that he met with him for hours over the phone and in person, that they worked together to try and resolve the issue informally, and that a decision was made, after many people were interviewed and many talks were held, that the negotiations were fruitless, that the complaints that my client had in his job and towards the people that supervised him would not be resolved sufficiently.

He received a formal notice that he could file a claim. He filed the claim within the time period. The EEOC sent him a rejection letter misstating many of the inactions that my client were purportedly to have done, that is, did not work with the counselor sufficient enough that the EEOC could issue a correct decision; therefore, they rejected his claim on wrong facts. They gave him a letter and a notice to appeal which he appealed timely to this Court.

Now is the counselor in the informal process was not working with my client, there would have been some

documentation, some letters, some declaration from the counselor saying, "Hey, this plaintiff, this individual is not cooperating with me. Therefore I'm closing his file. Therefore he has not even gone through step 1." And this EEOC process was correct in that my client did everything that was required of him up to and including filing the complaint with this Court.

Now in the meantime, we take the second scenario that within the subset of the time period of the EEOC complaint was this MSPB hearing. The MSPB hearing was held. He had an attorney for that and he signed a settlement agreement that only addressed the disability. It did not address the discrimination complaints, the retaliation complaints, or anything else.

He received an order from the court from the administrative law judge six days afterwards setting forth the fact that the settlement agreement resolved the claims. But the claims that were brought for the EEOC were not addressed. They were still live. And it's the plaintiff's contention that these claims that were still viable and were still being researched for the purposes of resolution up until December '95 when he received the formal notice or he received the formal permission to file a formal notice with the EEOC.

Therefore, it's our contention that his complaint is timely and it is valid with the Court.

THE COURT: Before I ask the other side for their comments on that, let me ask you this. It would seem to me that even if you're right on that, that it would be necessary

for you to allege that to show how that comes about that you've satisfied that administrative remedy.

MR. BARTONE: I would admit that when he filed his initial complaint with this court, there should have been a cause of action appealing the EEOC decision not to hear his case and the fact that he would like to have the issue of whether the EEOC correctly denied his claim as being untimely heard before this Court. I would agree with that.

THE COURT: Let's ask the other side for their comments on what you've just said.

MR. KERNER: Your Honor, although counsel has famed a well-spoken argument, the fact is the plaintiff settled his action at the MSPB level. He elected to go to the MSPB, and that forum precludes him from trying to relitigate the same issues here. The settlement is conclusive, and the Court has recognized that in its tentative ruling that it lacks jurisdiction.

That's the end of the case, your Honor. He's settled.

What happened, he got the benefit of his bargain in that settlement. They told him if he applied for disability and it was granted to him, that would be the end of that, and that also if he did get the disability, that his records would be expunged showing the adverse action for the termination. That was also done. He got the benefit of the settlement and now he's trying to relitigate.

Previously, until last Friday, he was pro per. It is fortunate that he has counsel today representing him, but his

position is not recognized at law. There is no jurisdiction. He settled.

THE COURT: Let's ask the other side for a comment on that point.

MR. BARTONE: Counsel makes a point about relitigation. We are not seeking relitigation. We are seeking litigation.

THE COURT: Well, his point is you can't, though, because you're settled. What's the answer to that?

MR. BARTONE: The answer is if you look at the settlement agreement, it had nothing to do with any retaliation claims or discrimination claims, that it was still alive though the EEOC.

THE COURT: Let's join issue on this. Why don't you both stand there at the lectern and let me ask you. Do the terms of the settlement, are they broad and cover all potential claims?

MR. BARTONE: No, your Honor. They only cover the disability claims, period.

THE COURT: Let's ask the other side, is that accurate?

MR. KERNER: No, your Honor. This man elected to go to the MSPB route, and that's what he did.

THE COURT: Okay.

MR. KERNER: The other routes were abandoned when he made that election. You can't take both streets.

THE COURT: So you're saying that when he settles the route that he's on, whatever the settlement is, that's the end of it?

MR. KERNER: That's the end of it.

THE COURT: And can't pursue other issues at all?

MR. KERNER: That's correct, your Honor.

THE COURT: Let's ask the other side.

MR. BARTONE: Your Honor, if you look at the settlement agreement, it's only five paragraphs and it only deals with disability and disability rights.

THE COURT: Right. He's going beyond that. Counsel on the other side is saying that by election of that course, of that method of settlement, once you conclude that one, that's all that there is; is that correct?

MR. BARTONE: If I was him, I would take that position also.

THE COURT: Since you're you, tell me.

MR. BARTONE: That's not correct in this case in that if he did want to include all of his rights including the rights that he brought before the EEOC and the MSPB, it would

have been in here. And what I'm saying is that the only litigation and talked about on 3-10-95 and signed by all the parties was the disability.

THE COURT: All right. I can see that I'm going to want to take this matter under submission at the end of our discussion and review that, but let's ask the other side if you have any closing comment on that point.

MR. KERNER: To reiterate, your Honor, and I don't mean to be redundant, he elected to go to the MSPB. That is his right. He doesn't get to go down the other road. Once he's in the MSPB, he's there. He settles. It's the end of the case. He got what he settled for. He got the benefit of his bargain. Settlement is sacred. We enter into these things to end litigation, not to have them continue. That's the only reason we do it.

THE COURT: All right. I appreciate your help from both counsel. I'm going to take the matter under submission. I want to review the matter just a little bit further. The Court will rule shortly. And the tentative ruling will just stand in that position as the tentative for the time being.

MR. BARTONE: Thank you, your Honor. Will we be notified by mail, your Honor?

THE COURT: Certainly, I'll rule on this within just a couple of days.

(End of proceedings.)

APPENDIX B. DISTRICT COURT ORDER FILED NOVEMBER 4, 1996

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Filed November 4, 1996

Case No. SA CV 96-0086-GLT (EEx)

JOSEPH LOCASCIO,

PLAINTIFF

vs.

ROBERT E. RUBIN, et al.,

DEFENDANTS.

Order Granting Defendants' Motion to Dismiss with Prejudice

Defendants' motion to dismiss is GRANTED without leave to amend.

Defendants' ("Government") move for dismissal of Plaintiff Joseph LoCascio's claims pursuant to FRCP 12 (b) (1) for lack of jurisdiction and 12 (b) (6) for failure to state a claim upon which relief can be granted. The Government argues the Plaintiff elected to pursue his remedies before the Merit Systems Protection Board (MSPB) and, thus, is precluded from now bringing suit in this Court. Plaintiff argues jurisdiction is proper in this court under the

Appendix B

Whistleblower's Protection Act, Pub.L. 101-12 (1989), and the Civil Service Reform Acts, Pub. L. 95-454 (1978).[1] The basic question is whether Plaintiff's discrimination claims should have been raised in his MSPB appeal or whether he is entitled to pursue them independently in a federal court action.

JURISDICTION

Federal employees asserting Title VII claims must exhaust administrative remedies as a precondition to filing a civil suit in federal district court. Vinieratos v. United States Dept. of Air Force, 939 F.2d 762, 768 (9th Cir. 1991). Plaintiff's case is properly considered a "mixed case", involving both a personnel decision and a claim of discrimination. A comprehensive statutory and regulatory scheme governs the processing of mixed cases. See, 5 U.S.C. S 7702; 29 C.F.R. SS 1613.401-1613.421, 1614.301-1614.310; 5 C.F.R. SS 1201.151-1201.175. A mixed case may be filed as a complaint with the MSPB or the employing agency's Equal Employment Opportunities (EEO) department, but not both. 5 U.S.C. S 7702; 29 C.F.R. S 1613.403; McAdams v. Reno, 64 F.3d 1137, 1141 (8th Cir. 1995). Either agency is authorized to review both the discrimination issues and civil service issues arising in a mixed case. 5 U.S.C. S 7702 (a).

A review of the procedural history of Plaintiff's action indicates this Court does not have jurisdiction over the

---

1. Plaintiff's attempted October 18, 1996, amendment to add a "whistleblower" claim does not assist his case. In this context, that claim also would be blocked by failure to exhaust his administrative remedy.

present action. Plaintiff filed an appeal with the MSPB on January 17, 1995.[2] See, Motion, Exh. 1 at 6. He later settled his appeal with the MSPB. This settlement curtailed his subsequent appeal rights, including the right to judicial review. See, Motion, Exh. 3 at 13-18 (On page 16, "[t]o be timely, your petition must be received by the [Federal Circuit] no later than 30 calendar days after the date this initial decision becomes final."). Plaintiff did not seek judicial review within the 30 calendar days allotted by the settlement, but rather filed a complaint with the EEO of the IRS on December 9, 1995. See, Motion, Exh. 4 at 19-20.[3]

The EEO dismissed Plaintiff's case as untimely and failing to comply with the counseling requirement. See, Motion, Exh. 5 at 21-22. Plaintiff disagreed with the dismissal and received a Right to File Notice. See,

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2. Plaintiff asserts he originally selected the EEO forum by filing a complaint with them on October 5, 1994. Opposition at 4:6-7. An EEO Counselor met with Plaintiff at that time and determined Plaintiff was raising a proposed removal (transfer to another IRS office). However, Plaintiff made only this initial contact with the Counselor and did not pursue the complaint further. The EEO considered Plaintiff's actions an "informal complaint." See, Motion, Exh. 5 at 21-22. there is not other indication Plaintiff elected the EEO forum before the MSPB forum. Thus, Plaintiff elected to pursue his remedies before the MSPB.

3. If an employee files in both places, the regulations provide "whichever is filed first [the EEO complaint or the MSPB appeal] shall be considered an election to proceed in that forum." 29 C.F.R. S 1613.403.

Opposition, Exh. 3. Plaintiff then filed his civil complaint on January 26, 1996.

Because Plaintiff's settlement of his MSPB appeal was the same as a final order, it was subject to judicial review before the Court of Appeals for the Federal Circuit. Motion, Exh. 3 at 15. Plaintiff did not seek judicial review. Thus, Plaintiff abandoned his initial forum for seeking review of his complaint and failed to exhaust administrative remedies. Vinieratos, 939 F.2d at 770-771. In such a situation, judicial review of the merits of Plaintiff's claims is precluded. Id., at 770, 772.

Plaintiff's attempt to confer jurisdiction to this Court by other statutory means is ineffective. The Court cannot hear Plaintiff's claims under the Civil Service Reform Act because Plaintiff has failed to exhaust administrative remedies. "[T]he Civil Service Reform Act specifically incorporates and applies Title VII's jurisdictional provision to those cases that involve charges of discrimination." Id., at 774. Plaintiff is also precluded from bringing a claim in this Court pursuant to the Federal Tort Claims Act. Rivera v. U.S., 924 F.2d 948, 951-952 (9th Cir. 1991). For the above reasons, the Court lacks subject matter jurisdiction over Plaintiff's claims.

DISPOSITION

Because this Court lacks jurisdiction over Plaintiff's claims, Defendants' motion to dismiss pursuant to FRCP 12 (b) (1) is GRANTED without leave to amend. The Court, therefore, does not reach Defendant' motion to dismiss pursuant to FRCP 12 (b) (6).

Appendix B

DATED: 11/4/96

s/ GARY L. TAYLOR
GARY L. TAYLOR
UNITED STATES DISTRICT JUDGE

APPENDIX C – UNITED STATES COURT OF APPEALS
9TH CIRCUIT MEMORANDUM,
FILED NOVEMBER 4, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed March 18, 1998
No. 97-55156

MEMORANDUM*

JOSEPH LOCASCIO,

PLAINTIFF-APPELLANT,

v.

ROBERT E. RUBIN,
Secretary of the Treasury,

DEFENDANT-APPELLEE.

Appeal from the United States District Court
for the Central District of California
Gary L. Taylor, District Judge, Presiding

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Appendix C

Submitted March 10, 1998**

Before: FLETCHER, BEEZER, and LEAVY,
Circuit Judges.

Joseph LoCascio, a former Internal Revenue Service ("IRS") appeals officer, appeals pro se the district court's dismissal for lack of jurisdiction of his action pursuant to Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act, alleging intentional discrimination and retaliation. We have jurisdiction pursuant to 28 U.S.C. { 1291, and we affirm.

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

APPENDIX D – UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT ORDER
FILED SEPTEMBER 8, 1998

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed September 8, 1998

No. 97-55156
D.C. No. CV-96-00086-GLT-EEx
Central California (Santa Ana)

ORDER

JOSEPH LOCASCIO,

PLAINTIFF-APPELLANT,

v.

ROBERT E. RUBIN,
Secretary of the Treasury,

DEFENDANT-APPELLEE.

Before: FLETCHER, BEEZER, and LEAVY,
Circuit Judges.

The panel has voted to deny appellant's petition for rehearing. Judge Fletcher has voted to reject the suggestion for rehearing en banc and Judges Beezer and Leavy so recommend.

Appendix D

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. p. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

"The existence of subject matter jurisdiction is a question of law reviewed de novo." Associated Builders & Contractors Inc. v. Local 302 Int'l Brotherhood of Electrical Workers, 109 F.3d 1353, 1355 (9th Cir. 1996). We agree with the district court that it lacked jurisdiction over LoCascio's complaint because he failed to appeal directly to the district court from his Merit Systems Protections Board settlement and because he failed to exhaust administrative review of the Equal Employment Opportunity claim. See Vinieratos v. United States, 939 F.2d 762, 767 n.2 (9th Cir. 1991).

AFFIRMED.

APPENDIX E. AMERICANS WITH DISABILITIES ACT (ADA, 1990)

* * *

SECTION 3. DEFINITIONS

* * *

TITLE I – EMPLOYMENT

* * *

SECTION 102. DISCRIMINATION

Subsection (a) of this section prohibits discrimination against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring or discharge of employees, employee compensation, advancement, job training, and other terms, conditions, and privileges of employment.

* * *

SECTION 502. PROHIBITION AGAINST RETALIATION AND COERCION

This section includes an anti-retaliation provision and a prohibition against interference, coercion or intimidation.

* * *

Section 102(a) of the legislation specifies that no covered entity shall discriminate –

Appendix E

This section is intended to include the range of employment decisions. Consistent with regulations implementing section 504 of the Rehabilitation Act of 1973, see 45 CFR 84.11(b), the decisions covered include: (1) recruitment, advertising, and the processing of applications for employment; (2) hiring, upgrading, promotion, award . . .

Reasonable Accommodation – The definition of "reasonable accommodation" in section 101(8) sets forth examples of types of accommodations that could ensure that a person with a disability will be able to perform the essential functions of a job. These include …part-time or modified work schedules … and other similar accommodations for individuals with disabilities.

APPENDIX F. CIVIL RIGHTS ACT OF 1964 AND 1991

{ 4.04(b) Age Discrimination Claims

Claims for race or gender discrimination under Title VII required the filing of administrative charges, a determination by the EEOC (or the appropriate state agency), and the issuance of a right to sue letter before a civil suit could be brought in state or federal court. However, claims under the ADEA merely required filing with the EEOC without actual determination by the agency or the issuance of a right to sue letter. ...

{ 4.04(b)(1) Statutory Changes

... It adds the following provision:

> "If a charge filed with the Commission under the Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice."

{ 4.04(b)(2) Explanation of Changes

The new law changes the limitations requirements under the ADEA in only one respect. A party must still file an administrative complaint before suit can be brought. ... But if the EEOC assumes jurisdiction, makes an investigation, engages in conciliation efforts, and finally dismisses or terminates the proceedings, it must issue a notice of its action. The person affected may then bring suit within 90 days. ...

APPENDIX G. TITLE VII, SECTION 4.04(b)

* * *

{ 4.04(b) Age Discrimination Claims

Claims for race or gender discrimination under Title VII required the filing of administrative charges, a determination by the EEOC (or the appropriate state agency), and the issuance of a right to sue letter before a civil suit could be brought in state of federal court. However, claims under ADEA merely required filing with the EEOC without actual determination by the agency or the issuance of a right to sue letter. Sixty days after an administrative complaint was filed, an action could be brought under the ADEA whether or not the EEOC acted or issued a right to sue letter. In addition, a claimant must bring suit within two years of the time when a cause of action accrued, unless the violation was willful, in which case a three-year statute of limitations applied. However, if the EEOC engages in efforts at settlement and conciliation, the two-or three-year statute of limitations may be tolled for one year, under Section 626(e)(2).

Appendix H. CIVIL SERVICE REFORM ACT OF 1978, 5 USC

{ 2301. ... Personnel practices

"(2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights."

{ 3110. ... Prohibited personnel practices

"(9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or regulation;"

APPENDIX I. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION RULES AS APPLIED TO MIXED CASES, 29 C.F.R.

* * *

§ 1614.105 Right to File a Civil Action in Mixed Cases

(d) Unless you agree to a longer counseling period, the counselor shall conduct the final interview, and provide you with a "Notice of Right to File a Discrimination Complaint" form, within 30 days of the date you brought the matter to the counselor's attention.

(e) Prior to the end of the 30 day period discussed above, you may agree in writing to extend the counseling period of no more than 60 days. If the matter has not been resolved before the conclusion of the agreed upon extension, the "Notice of Right to File a Discrimination Complaint" form must be issued.

§ 1614.302

If your formal complaint concerns a matter appealable to the Merit Systems Protection Board (MSPB) (i.e., a "mixed case"), you may file a civil action in United States District Court:

* * *

§ 1614.310

(c.) Within 30 days of receipt of notice that the EEOC concurs with or has determined not to consider the decision of the MSPB; or

APPENDIX J. FAMILY AND MEDICAL LEAVE ACT OF 1993, 20 CFR

* * *

Title II for Federal employees with separate regulations issued and administered by the U.S. Office of Personnel Management.

* * *

Eligibility:

...

Examples of a serious health condition cited in the legislative history include ... injuries caused by serious accidents on or off the job, ...

Reduced Leave Schedule:

...

Because the statute permits intermittent leave or leave on a "reduced leave schedule", in cases of medical necessity, it is also clear that the Act contemplates that employees would be entitled to FMLA leave in some cases because of doctor's visits or therapy – i.e. that the absence requiring leave need not be due to a condition that is incapacitating at that point in time. ...

APPENDIX K. JUDICIARY ACT OF 1875

* * *

{ 1, 18 Stat. 470

(The Constitution provides that federal courts may be given original jurisdiction over "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const., Art. III, {{ 1,2).

"Since 1875 Congress has provided the federal trial courts with general jurisdiction over such cases."

APPENDIX L. REHABILITATION ACT, SECTION 501

* * *

SEC. 4. REPRISALS

(B) AMENDMENT TO SECTION 2302(b)(9):

* * *

"(9) take or fail to take, or threaten to take or fail to take any personnel action against any employee or applicant for employment because of –

"(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

APPENDIX M. TITLE 5 U.S.C.

* * *

{7703(a), (b) Judicial Review of Decisions of the Merit Systems Protection Board

(a)(1) Any employee of applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision.

(b)(2) Cases of discrimination subject to the provisions of section 7702 of this title shall be filed under section 717(c) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(c), ...

APPENDIX N. WHISTLEBLOWER ACT OF 1989
5 U.S.C.

* * *

[1201 Sec. 2 Findings and Purpose.

(a) Findings ...

(b) Purpose. The purpose of this Act is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by –

(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and ...

(2) establishing-

(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices; ...

APPENDIX O. SETTLEMENT AGREEMENT, MARCH, 1995

Settlement Agreement
LoCascio v. Dept of Treasury
MSPB Case Number EF-0432-95-0343-I-1

1. Appellant and Agency will jointly request dismissal of this appeal without prejudice to the refiled by Appellant or his representative within thirty (30) days after the date that any OPM initial decision or, if appealed, any OPM reconsideration decision denying Appellant's disability retirement application becomes final.

2. Agency shall submit the completed disability retirement application of Appellant to OPM within thirty (30) days from the effective date of this Agreement or receipt of the application package whichever is latest. In its portion of the disability retirement application documentation Agency will certify a deficiency in service due to medical reasons and confirm that accommodation is not available.

3. In the event Appellant's disability retirement application is denied by OPM either initially or after a reconsideration request, and this appeal if refiled, the Agency will not be liable for back pay for the period from the date of this settlement agreement through the date this appeal is refiled.

4. In the event Appellant's disability retirement application is approved, Appellant will not refile this appeal, and Agency documents in Appellant OPF relating or referring to removal of Appellant effective 12/24/94, to read that Appellant retired on disability, and (B) remove from Appellant's OPF any and all documentation relating and/or referring in any way to Appellant's alleged performance problem(s).

Appendix 0

5. Agency will not oppose the granting of an enrolled agent's card to Appellant, should Appellant apply for same, on the basis of any alleged performance or medical problem(s). However, the Agency will answer truthfully all inquiries of the Director of Practice.

DATED: 3/10/95
/s JOSEPH LOCASCIO
JOSEPH LOCASCIO, Appellant

DATED: 3/15/95
s/ STEVEN E. BROWN
STEVEN E. BROWN, Esquire
Appellant's Representative

DATED: 3/23/95
s/ ROBERT WILSON
ROBERT WILSON, Esquire
Agency Representative

APPENDIX P. EEO FORMAL COMPLAINT, DECEMBER 8, 1995

DEPARTMENT OF THE TREASURY
INDIVIDUAL COMPLAINT OF EMPLOYMENT DISCRIMINATION

BASED ON

RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE, PHYSICAL OR MENTAL HANDICAP, OR RETALIATION

Filed December 8, 1995
Complaint No. 96-4056

* * *

8. On this same matter have you filed a grievance under a negotiated grievance procedure?

No. The Union refused to file on my behalf.

Under the Agency grievance system?

No.

Have you appealed to MSPB?

Yes.

State where and when filed or appealed, give identifying numbers and describe present status.

Seattle, WA, 1/20/95, SF-0432-95-0343,
Status Dismissed.

APPENDIX Q. FILING A CIVIL ACTION

You also have the right to file a civil action in an appropriate U.S. District Court *within 90 days* after you receive this final decision if you do not appeal to EEOC.

You may also file a civil action after 180 days from the date of filing an appeal with EEOC if there has been no final decision by EEOC.

If you claim age discrimination, you should seek the advice of an attorney if you wish to file a civil action after expiration of the time limits noted above. The courts disagree about when a civil action must be filed and may permit an age discrimination complaint to be filed two years or more from the date of the alleged discrimination.

You must comply with the following instructions:

(1) You must name ROBERT E. RUBIN, SECRETARY OF THE TREASURY, as the defendant. Failure to provide his name and official title may result in the dismissal of your case.

...

APPENDIX R. L.A. TIMES NEWSPAPER ARTICLE, NOVEMBER 16, 1998

LOS ANGELES TIMES
NOVEMBER 16, 1998

HIGH COURT BACKS WORKERS' RIGHT TO SUE

BY

DAVID G. SAVAGE
TIMES STAFF WRITER

LAW: JUSTICES REVERSE LOWER COURTS BY ALLOWING DISCRIMINATION CASES WVEN WHEN UNIONS OR COMPANIES HAVE POLICIES REQUIRING ARBITRATION OF DISPUTES.

WASHINGTON – Workers generally have a right to go to court to sue their employers for discrimination, the Supreme Court said Monday, even when their unions or companies have a policy calling for arbitration of disputes.

By a 9-0 vote, the justices reversed two lower courts that had blocked a South Carolina longshoreman, who previously had been injured on the job but recovered, from suing his employer.

The shipping firm had refused to rehire Caesar Wright, the longshoreman, because of his back injury, and he sued for damages under the Americans with Disabilities Act.

But the case came to the Supreme Court to test another issue, one that has divided American corporations and civil rights lawyers for much of this decade.

Appendix R

Since 1991, companies have been pressing for the adoption of mandatory arbitration policies as an alternative to costly federal court battles. Some of these are written into union contracts. In other instances, they are included in papers signed by newly hired employees.

Corporate lawyers rely on a 1991 high court ruling that touted the virtues of arbitration as quick and convenient.

But civil rights lawyers have resisted this move as fundamentally unfair to workers. Companies choose the arbitrators who will hear a dispute, and the plaintiffs cannot gather the evidence they need to prove their claims of discrimination, lawyers say. They rely on the federal civil rights laws that, since 1964, have made it illegal for employers to discriminate based on race, sex, religion and ethnicity as well as age and disability.

The union contract "does not contain a clear and unmistakable waiver" of the longshoreman's right to sue, Scalia said. "The right to a federal judicial forum is of sufficient importance," he said, that it cannot be casually waived.

But the court stopped short of deciding whether the worker could sue had the contract gone further and absolutely barred employees from going to court.

Predictably, lawyers for plaintiffs and corporations interpreted the outcome differently.

Cliff Palefsky, a San Francisco employment lawyer, said that the decisions show arbitration is falling out of favor.

Appendix R

"I think there is a clear trend here. The court is backing away from Gilmer," he said, referring to the 1991 ruling that endorsed arbitration.

By contrast, a lawyer for a group of 300 of America's largest private companies said that Monday's ruling "was very narrow" and did not disturb the trend toward arbitration.

"I don't think this is really an anti-arbitration decision," said Ann Reesman of the Equal Employment Advisory Council. "Gilmer is still alive and well," she added.

Two Rulings Against Arbitration

In the last week, the foes of arbitration have won two important court decisions. Neither case finally resolves the issue, however.

Last week, the Supreme Court refused to hear an employer's appeal in a closely watched California case that rejected "compulsory arbitration" for new employees.

Tonyja Duffield went to work as a stock broker in 1988 and signed a standard industry form requiring arbitration of all disputes. In 1995, she said that she was a victim of sexual harassment at work and sued her employer.

The company sought to have her case thrown out of court and sent to arbitration.

But the U.S. 9th Circuit Court of Appeals ruled that federal civil rights laws trump the binding arbitration clauses. Companies cannot "as a condition of employment, compel

persons to forego their right" to go to court, wrote Judge Stephen Reinhardt of Los Angeles. Workers can agree voluntarily to arbitration, but they cannot be forced to do so without their knowledge or consent, he said.

The securities company, backed by the U.S. Chamber of Commerce and several other employer groups, appealed to the high court. But the justices turned down the appeal (Robertson, Stephens & Co. vs. Duffield, 98-237) last week.

Meanwhile, in the case of the South Carolina longshoreman, the move conservative U.S. court of appeals based in Richmond, Va., had ruled that employers can enforce binding arbitration clauses on unwilling workers.

In Wright's case, his union contract said that "any dispute" over the "terms and conditions of employment" shall be resolved by a grievance committee made up of management and labor representatives. The appeals court said that this clause is "binding" and barred Wright from suing in federal court.

All nine justices voted to reverse that ruling (Wright vs. Universal Maritime Services Corp., 97-889), although Justice Antonin Scalia's opinion focused on a narrow reason for doing so.

APPENDIX S. DISABILITY BENEFITS NO BAR TO ADA SUIT, NATIONAL LAW JOURNAL, MAY 4, 1998

EMPLOYMENT AND LABOR LAW

DISABILITY BENEFITS NO BAR TO ADA SUIT

BY: ELLEN L. ROSEN
NATIONAL LAW JOURNAL STAFF REPORTER

The National Law Journal (p. B02)
Monday, May 4, 1998

The 9th U.S. Circuit Court of Appeals April 21 joined the majority of circuit courts in holding that an employee who seeks or receives disability benefits may still file a claim for discrimination against an employer under the Americans With Disabilities Act. *Johnson v. Oregon*, 98 C.D.O. 2986.

The plaintiff in the case suffered from carpal tunnel syndrome. After several operations, her doctor suggested several accommodations so that she could return to work. But she was fired instead, with her state employer rejecting her requests as unreasonable. She began collecting disability benefits, but sued her employer as well.

The court held that "a rule contrary to the one we adopt today would contravene the purposes of the ADA by forcing plaintiffs to choose between enforcing their rights under the ADA and seeking immediate, subsistence benefits."

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